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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Austin Flake and Logan Flake,

10 Plaintiffs,

11 v.

12 Joseph M Arpaio, Ava J Arpaio, County of
13 Maricopa, Maricopa County Board of
14 Supervisors, Marie Trombi, and John Doe
Trombi,

15 Defendants.
16

No. CV-15-01132-PHX-NVW

ORDER

17 Before the court are Defendant's Motion for Summary Judgment (Doc. 107),
18 Plaintiffs' Response and Cross-Motion for Summary Judgment (actually a cross-motion
19 for partial summary judgment) (Doc. 114), and the parties' accompanying briefs.
20

21 **I. FACTUAL BACKGROUND**

22 Except where noted, the following facts are not in dispute. In 2014, plaintiffs
23 Austin Flake ("Austin") and Logan Brown ("Logan") (collectively "the Flakes") were
24 married and living together in Provo, Utah.¹ (Doc. 113, ¶ 31; Doc. 121, ¶ 31.) Austin is
25 the son of United States Senator Jeff Flake. (Doc. 113, ¶ 33; Doc. 121, ¶ 33.) In 2014,
26 Logan's parents, Jesse and MaLeisa Hughes ("the Hugheses") ran a dog kennel business
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28 ¹ Logan's last name at the time of the incident was Flake. It is now Brown. (Doc.
107 at 1.)

1 out of their Gilbert, Arizona home. (Doc. 113, ¶¶ 34-35; Doc. 121, ¶¶ 34-35.) The
2 kennel consisted of a small, air-conditioned room attached to the house where the
3 Hugheses would board anywhere from fifteen to thirty dogs at a time. (Doc. 113, ¶ 36;
4 Doc. 121, ¶ 36.) The room was roughly nine feet by twelve feet in size. *See* Doc. 108-3
5 at 6.

6 On June 14, 2014, the Flakes arrived in Gilbert to take care of the property,
7 including the kennel, while the Hugheses went out of town. (*Id.*) The first five days
8 passed without incident. (Doc. 113, ¶¶ 37, 48; Doc. 121, ¶¶ 37, 48.) The Flakes stayed
9 in the main part of the house, which was separate from the kennel space and had its own
10 independent air conditioning unit that functioned properly throughout their stay. (Doc.
11 113, ¶ 50; Doc. 121, ¶ 50.) However, at approximately 5:30 AM on Friday, June 20,
12 Austin went to check on the kennel and found the room so hot that the twenty-one dogs
13 had either died or grown seriously ill. (Doc. 113, ¶ 46; Doc. 121, ¶ 46.) (Some of the
14 dogs still living died shortly thereafter, though some may have survived. *See* Doc. 108-1
15 at 170.) The Flakes maintain that the air conditioning unit inside the kennel room
16 malfunctioned sometime after 11:00 PM the night before when Logan last checked on the
17 dogs. (Doc. 113, ¶¶ 38, 45.) Defendants say the air conditioning was functioning
18 normally but was simply inadequate to accommodate that many dogs in such a small
19 space with insufficient ventilation. (Doc. 121, ¶ 39.) The parties also disagree as to
20 whether a window in the room was left slightly open. (Doc. 113, ¶ 77; Doc. 121, ¶ 77.)
21 The Flakes did not provide water for the dogs throughout the night. (Doc. 108, ¶ 4; Doc.
22 113, ¶ 4.)

23 The next day, deputies from the Maricopa County Sheriff's Office ("the Sheriff's
24 Office"), then headed by defendant Sheriff Joseph Arpaio, came to the Hugheses' home
25 to investigate. (Doc. 113, ¶ 41; Doc. 121, ¶ 41.) In a statement issued to the media
26 shortly after, the Sheriff's Office referred to the incident as a "tragic accident." (Doc.
27 113, ¶ 53; Doc. 121, ¶ 53.) Eight days later, on June 23, 2014, the Sheriff's Office issued
28 a press release headlined "Sheriff Arpaio Promises Full Investigation into Deaths of 20

1 Dogs in Gilbert, AZ Boarding Facility,” portions of which read as follows:

2
3 “No Stone Will Go Unturned”

4 (Phoenix, AZ) Maricopa County Sheriff Joe Arpaio, known for his
5 aggressive stance on animal abuse and neglect, held a press conference
6 today shortly after meeting with several owners whose dogs died over the
7 weekend at a Gilbert, AZ kennel. In the press conference, the Sheriff
8 reiterated his promise to fully investigate why so many dogs died a needless
and horrible death.

9 Sheriff Arpaio’s deputies responded to a call on Saturday morning,
10 June 21, 2014 at the Green Acres Dog Boarding Facility at 15723 East
11 Appleby Road and found 20 dead dogs – all different breeds, sizes and
ages, piled into a shed on the property.

12

13 “Owners claim the air conditioning was cut off after a dog chewed
14 through some electrical wiring,” Arpaio says. “But it seems unreasonable
15 that dogs could be healthy at 11PM at night and dead by 5:30am the next
16 morning as the owners suggest. Even the veterinarian I met with today
17 agrees that the timeline given by the owners and caretakers is highly
suspect.”

18

19 “Clearly this is a situation that demands immediate and thorough
20 investigation and I promise that my office will deliver just that,” Arpaio
21 says.

22 Jesse and Malesia Hughes who have operated the pet boarding
23 business for two years were out of the state when the dogs died. The
animals were being overseen by their relatives, Logan and Austin Flake.

24

25
26 (Doc. 113-6 at 87-88.)

27 The Sheriff’s Office then initiated an investigation. (Doc. 108, ¶ 6; Doc. 113, ¶ 6.)
28 Two experts, veterinarian Bernard Mangone and electrical engineer George Hogge,

1 supplied the Sheriff's Office with reports that were used in the Sheriff's investigative
2 report. (Doc. 108, ¶ 9; Doc. 113, ¶ 9.) Hogge concluded that the air conditioning system
3 in the kennel was "inadequate and improperly configured" for the room, but he also said
4 the air conditioner operated all night. (Doc. 108, ¶ 10; Doc. 113, ¶ 10.) Mangone
5 concluded that the dogs would not have had adequate space or water in the room. (Doc.
6 108-5 at 5-6.) Defendant Marie Trombi, a deputy sheriff, was appointed to investigate
7 the case. (Doc. 108-4 at 15.) She "repeatedly briefed Arpaio" on the ongoing
8 investigation. (Doc. 113, ¶ 89; Doc. 121, ¶ 89.)

9 On September 9, 2014, Arpaio held a twenty-two minute press conference
10 announcing that he was recommending to the Maricopa County Attorney that the Flakes
11 and the Hugheses be charged with twenty-one felony counts and six misdemeanor counts
12 of animal cruelty.² (Doc. 113, ¶ 56; Doc. 121, ¶ 56.) In the course of the press
13 conference, Arpaio stated, "I'm very confident we have the proper evidence" and that
14 "we act on facts" in investigating cases. (Doc. 61-1 at 5; Doc. 113, ¶ 57; Doc. 121, ¶ 57.)
15 Arpaio further stated, "I always said it doesn't meet the smell test when you put 28 dogs
16 in a 9-by-12 room." (Doc. 113-7 at 12.)³

17 On October 10, 2014, prosecutors took the matter before a grand jury for
18 indictment of the Flakes and the Hugheses. (Doc. 113, ¶ 62; Doc. 121, ¶ 62.) Defendant
19 Marie Trombi, a deputy sheriff, testified during that proceeding to what the Flakes call
20 "material misrepresentations and omissions" regarding the kennel. See Doc. 113, ¶¶ 63-
21

22 ² Defendants vigorously maintain that it was the Sheriff's Office, not Arpaio
23 personally, who recommended prosecuting the Flakes. See Doc. 121, ¶¶ 91-93. The
24 difference does not matter, as Sheriff Arpaio announced the recommendations and his
25 own confidence in them. The "Sheriff's Office" is not a legal entity. It is a convenient
26 label for the organization the sheriff directs. The sheriff is the constitutional officer for
the county. Ariz. Const. Art. XII, § 3; A.R.S. § 11-401(a)(1). The sheriff is the final
actor for the county on most matters, which are not subject to review by any other actor
or body for the county. Only the sheriff and the county can sue or be sued.

27 ³ The Flakes characterize Arpaio as having said "that the Flakes' claim that the air
28 conditioning system had failed in the kennel did not 'meet the smell test' and that the
Flakes had failed to provide the dogs with adequate food, water and shelter." (Doc. 113,
¶ 58 (emphasis in original).) The portion of the press conference transcript to which they
point very clearly says neither of those. See Doc. 113-7 at 12.

1 65; Doc. 121, ¶¶ 63-65. Trombi testified that the building's electric records show the air
2 conditioning was on and working all night until 5:30 AM the morning of Friday, June 20.
3 (Doc. 113, ¶ 66; Doc. 121, ¶ 66.) Hogge's expert report, which was accessible to Trombi
4 at the time, concluded that the air conditioning unit was "inadequate and improperly
5 configured" for the room, in addition to being poorly maintained. (Doc. 108-3 at 4.)
6 Hogge also concluded that there was "no evidence of any electrical or mechanical failure
7 of the HVAC system." (Doc. 108-3 at 24.) Grand jurors specifically questioned Trombi
8 about whether the air conditioner was on. She answered that, according to the Flakes'
9 electrical records, it was on all night. (Doc. 113, ¶ 66; Doc. 121, ¶ 5.) In any event, the
10 grand jury indicted the Flakes on twenty-one felony counts and six misdemeanor counts
11 of animal cruelty. (Doc. 113, ¶ 78; Doc. 121, ¶ 78). The Flakes were never arrested.
12 (Doc. 108, ¶ 19; Doc. 113, ¶ 19.) They were, however, restricted from leaving the state
13 of Arizona and from having "custody or control over another person's animal/pet." (Doc.
14 113-7 at 64.)

15 Two months later on December 2, 2014, the Flakes filed a motion to return the
16 case to the grand jury in light of "material misrepresentations and omissions" in Trombi's
17 testimony. (Doc. 113, ¶ 80; Doc. 121, ¶ 80.) Three weeks later, prosecutors from the
18 County Attorney's Office voluntarily dismissed the case. (Doc. 113, ¶¶ 81, 83; Doc. 121,
19 ¶¶ 81, 83.) Maricopa County Attorney Bill Montgomery told the press that "the theory of
20 the case as initially presented to the Grand Jury did not take into account the possibility
21 that there were issues with an air conditioning unit." (Doc. 113, ¶ 82; Doc. 121, ¶ 82.)
22 Montgomery said that the dismissal "reflects our ethical and professional duty as
23 prosecutors to review information presented to us by the defense and to assess what
24 impact, if any, it has on our case." (*Id.*) It turned out that the electric company records
25 did show the air conditioner may have failed.

26 After the charges were dismissed, Arpaio issued another press release and posted a
27 video statement online. (Doc. 113, ¶ 84; Doc. 121, ¶ 84.) In the video message Arpaio
28 stated, "I anticipate the charges will be re-filed regarding the facts that we obtained doing

1 our investigation” and that the “criminal justice system, I feel, will prevail and justice
2 will be done.” (Doc. 113, ¶ 84; Doc. 121, ¶ 84.) In accordance with the County
3 Attorney’s explanation of why he dismissed the charges, no further charges have been
4 brought against the Flakes. Trombi has since stated in deposition testimony that she
5 believes Austin and Logan did not purposely or intentionally harm any of the dogs and
6 that they were not responsible for the kennel’s poor ventilation. (Doc. 113, ¶¶ 85, 87;
7 Doc. 121, ¶¶ 85, 87.)

8 The Flakes filed this action on June 19, 2015, naming Arpaio, Trombi, and
9 Maricopa County as defendants. (Doc. 1.) The third amended complaint raises claims of
10 malicious prosecution, defamation, false light invasion of privacy, and First Amendment
11 retaliation. (Doc. 101.) Defendants move for summary judgment on all counts. The
12 Flakes themselves seek summary judgment against the defense of qualified immunity and
13 on lack of probable cause.

14 **II. LEGAL STANDARD**

15 A motion for summary judgment tests whether the opposing party has sufficient
16 evidence to merit a trial. Summary judgment should be granted if the evidence reveals no
17 genuine dispute about any material fact and the moving party is entitled to judgment as a
18 matter of law. Fed. R. Civ. P. 56(a). A material fact is one that might affect the outcome
19 of the action under the governing law, and a factual dispute is genuine “if the evidence is
20 such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v.*
21 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

22 The movant has the burden of showing the absence of genuine disputes of material
23 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, once the movant
24 shows an absence of evidence to support the nonmoving party’s case, the burden shifts to
25 the party resisting the motion. The party opposing summary judgment must then “set
26 forth specific facts showing that there is a genuine issue for trial” and may not rest upon
27 the pleadings. *Anderson*, 477 U.S. at 256. If a party fails to properly support an assertion
28 of fact or fails to properly address another party’s assertion of fact, the court may

1 consider the fact undisputed for purposes of the motion. Fed. R. Civ. P. 56(e)(2). The
2 Court must view the evidence in the light most favorable to the nonmoving party, must
3 not weigh the evidence or assess its credibility, and must draw all justifiable inferences in
4 favor of the nonmoving party. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133,
5 150 (2000); *Anderson*, 477 U.S. at 255.

6 **III. ANALYSIS**

7 **A. Malicious Prosecution**

8 Defendants first seek summary judgment on the Flakes' claims of malicious
9 prosecution, which the Flakes bring against Arpaio under both federal and state law and
10 against Trombi under federal law only. (Doc. 101 at 9.)

11 Under Arizona law, the tort of malicious prosecution requires proof of “(1) a
12 criminal prosecution, (2) that terminates in favor of the plaintiff, (3) with the defendants
13 as prosecutors, (4) actuated by malice, (5) without probable cause, and (6) causing
14 damages.” *Slade v. City of Phoenix*, 112 Ariz. 298, 300, 541 P.2d 550, 552 (1975). A
15 plaintiff may also bring a malicious prosecution action under 42 U.S.C. § 1983. Under
16 that federal provision, the plaintiff must make out all elements of the state law cause of
17 action and also show that the defendant pursued the prosecution ““for the purpose of
18 denying [the plaintiff] equal protection or another specific constitutional right.”” *Awabdy*
19 *v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004) (quoting *Freeman v. City of*
20 *Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995)).

21 **1. Independent Judgment Presumption**

22 Defendants first argue that summary judgment should be granted because the
23 Flakes have not overcome the “independent judgment presumption.” In malicious
24 prosecution cases, federal law recognizes a rebuttable presumption that “the prosecutor
25 filing the complaint exercised independent judgment in determining that probable cause
26 for an accused’s arrest exists at that time,” thereby absolving from liability any law
27 enforcement officers who may have aided pre-indictment. *Newman v. Cty. of Orange*,
28 457 F.3d 991, 993 (9th Cir. 2006) (citing *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir.

1 1981)). The plaintiff bears the burden of production to rebut the presumption. *Newman*,
2 457 F.3d at 993.

3 Even where a prosecutor charged the plaintiff based solely on an officer's report,
4 the plaintiff must do more than simply provide his own contradictory account of events.
5 *Id.* at 994-95 (citing *Sloman v. Tadlock*, 21 F.3d 1462, 1474 (9th Cir. 1994)). *See, e.g.,*
6 *Harper v. City of Los Angeles*, 533 F.3d 1010, 1027-28 (9th Cir. 2008) (presumption
7 overcome where un rebutted trial testimony revealed prosecutor worked "hand-in-hand"
8 with investigating officers, officers' "ongoing daily interactions" with prosecutors led to
9 plaintiff's arrest, and "substantial evidence" showed officers "failed to turn over
10 evidence" and "hounded" prosecutors to file charges); *Barlow v. Ground*, 943 F.2d 1132
11 (9th Cir. 1991) (presumption overcome on summary judgment where an independent
12 witness corroborated plaintiff's account calling police report into question); *Borunda v.*
13 *Richmond*, 885 F.2d 1384, 1390 (9th Cir. 1988) (presumption overcome where plaintiff
14 pointed both to "striking omissions" in police report and to the fact "that the officers
15 themselves offered conflicting stories"); *Smiddy*, 665 F.2d at 266 (holding that
16 presumption is overcome by "a showing that the district attorney was pressured or caused
17 by the investigating officers to act contrary to his independent judgment" or "the
18 presentation by the officers to the district attorney of information known by them to be
19 false."). *Cf. Westwood v. City of Hermiston*, 787 F. Supp. 2d 1174, 1205-06 (D. Or.
20 2011) (presumption not overcome where prosecutor testified he "independently made the
21 decision to charge" plaintiff and plaintiff failed to "point to any evidence" that officers
22 "exerted pressure on [the prosecutor], knowingly provided misinformation to him, or
23 concealed exculpatory evidence").

24 Defendants here argue that the record contains insufficient evidence to overcome
25 the independent judgment presumption. (Doc. 107 at 5.) That presumption, however,
26 exists only under federal law, and Defendants cite no Arizona authority holding that it
27 applies also to malicious prosecution claims under state law. For a finding of liability
28 here, state law would still require that Defendants' tortious conduct, as opposed to an

1 independent decision by prosecutors, caused the Flakes to be charged with animal
2 cruelty. *See, e.g., City of Douglas v. Burden*, 24 Ariz. 95, 101-02, 206 P. 1085, 1087
3 (1922) (chain of causation sufficient for proximate causation “is broken when a new or
4 subsequent cause intervenes so as to become the sole factor producing the injurious
5 result”). But it is unclear whether Arizona law imposes a *presumption* that prosecutors
6 acted independently or simply leaves intact the plaintiff’s usual burden of proof.

7 Either way the record here shows a disputed question of fact. As discussed below,
8 Arpaio issued multiple statements to the press about the investigation, culminating in a
9 twenty-two-minute press conference publicly recommending that prosecutors charge the
10 Flakes with animal cruelty. (Doc. 113, ¶ 56; Doc. 121, ¶ 56.) One month later, the
11 County Attorney’s Office convened a grand jury to do just that. Yet two months after
12 charging the Flakes, prosecutors dropped the charges because they “did not take into
13 account” that the air conditioning might have malfunctioned. A jury could reasonably
14 infer from this that prosecutors brought charges because of the pressure from Arpaio and
15 the representations he and his office made about the investigation.

16 Additionally, the Flakes point to supposed discrepancies between Trombi’s grand
17 jury testimony and her deposition testimony that they say amount to circumstantial
18 evidence that she either lied to or materially misled the prosecutors. (Doc. 114 at 4-5.)
19 But no reasonable finder of fact could conclude Trombi did either of those. At most the
20 evidence in the record shows she misunderstood the law of animal cruelty but pursued
21 charges against the Flakes in good faith. It is not inferable that she knew what she said
22 was false as opposed to mistaken or incomplete. But mistaken or incomplete testimony
23 does not support an inference of a knowing falsehood. There is no evidence suggesting
24 she exhibited an improper motive that interfered with the prosecutors’ decision. As a
25 matter of law, on the record here only Arpaio could have exerted improper influence over
26 the County Attorney’s Office.

27 As Defendants correctly point out, Trombi did provide the County Attorney’s
28 Office with her entire case file, “including the Salt River Project records of electrical

usage.” (Doc. 108, ¶¶ 20-21; Doc. 113, ¶¶ 20-21.) But a rational factfinder could still conclude that even though prosecutors had the 2,000 page case file, they relied on Trombi’s inaccurate (but good-faith) characterization of its contents instead of searching themselves because of the pressure imposed by Arpaio to bring charges. A factfinder could thus reasonably find that the prosecutors initially charged the Flakes based on pressure from Arpaio.

Defendants also point out that Shawn Steinberg, the prosecutor who presented the case to the grand jury, affirms that she reviewed the complete file and chose to bring the case without being coerced or misled. (Doc. 108, ¶ 23; Doc. 108-9 at 2.) But that simply raises a factual dispute that cannot be resolved on summary judgment. A rational trier of fact could reach a conclusion either way in light of the evidence. That is enough to defeat the independent judgment presumption on summary judgment.

2. Substantive Tort

Defendants next argue the Flakes cannot show either that prosecutors lacked probable cause or that Trombi and Arpaio pursued charges with malicious intent. (Doc. 107 at 7.) The Flakes seek summary judgment in their own favor that there was no probable cause. (Doc. 114 at 10.)

a. Probable Cause

“In the context of malicious prosecution, probable cause is defined as ‘a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the accused is guilty of the offense.’” *Gonzales v. City of Phoenix*, 203 Ariz. 152, 155, 52 P.3d 184, 187 (2002) (quoting *McClinton v. Rice*, 76 Ariz. 358, 367, 265 P.2d 425, 431 (1953)).

The County Attorney’s Office charged the Flakes with “intentionally or knowingly” subjecting all the dogs “to cruel neglect or abandonment.”⁴ (Doc. 113-7 at

⁴ Prosecutors also charged them with six misdemeanor counts of “intentionally, knowingly, or recklessly . . . fail[ing] to provide necessary medical attention” to several of the dogs. (Doc. 113-7 at 58-59.) See A.R.S. § 13-2910(A)(2). The Flakes are not pursuing claims here for the misdemeanor counts. (Doc. 130 at 3 n.1.) Additionally, for the first time in their Reply and Response to the Flakes’ cross-motion for summary

1 49-58.) *See* A.R.S. § 13-2910(A)(8). Arizona’s criminal code defines “knowingly” as
2 awareness or belief “that the person’s conduct is of that nature [specified in an offense] or
3 that the circumstance exists.” A.R.S. § 13-105(10)(b). It defines “intentionally” as,
4 “with respect to a result or to conduct described by a statute defining an offense, that a
5 person’s objective is to cause that result or to engage in that conduct.” A.R.S. § 13-
6 105(10)(a). And “cruel neglect” is defined as “fail[ing] to provide an animal with
7 necessary food, water or shelter.” A.R.S. § 13-2910(H)(3). As a matter of law there was
8 no probable cause to charge the Flakes with felony animal cruelty.

9 For five days while the Flakes were housesitting before the night in question, the
10 dogs stayed in the kennel space with no issues. That left the Flakes with no reason to
11 suspect the conditions were inadequate. (Doc. 113, ¶ 48; Doc. 121, ¶ 48.) The Hugheses
12 had long operated the kennel out of the same space without any incident of a sick or dead
13 dog. (Doc. 113, ¶ 52; Doc. 121, ¶ 52.) Defendants have pointed to no evidence
14 reasonably indicating that the Flakes actually intended to deprive the dogs of necessary
15 food, water or shelter. Nor is there evidence that they knew their actions would produce
16 such a result. Defendants instead rely on statements by experts who assisted with the
17 Sheriff’s Office investigation. Bernard Mangone, a veterinarian, described the deaths as
18 “wholly preventable,” noted the dogs were placed in “overcrowded conditions,” and
19 concluded that “[n]o reasonable or prudent individual would deem it reasonable to house
20 that number of dogs in a room of the measured size.” (Doc. 107 at 7.) Defendants also
21 quote a professor of veterinary medicine as calling the kennel’s condition “unacceptable”
22 and the airflow and temperature “not adequate.” (Doc. 107 at 8.)

23 Nothing the veterinarians said addresses what the Flakes knew or intended. The
24 police and prosecutors may not delegate their charge to veterinarians. The veterinarians
25 gave their observations but did not know the standard for felony animal cruelty, and what
26

27 judgment, Defendants raise an argument that probable cause existed as to A.R.S. § 13-
28 2910(A)(1) as a lesser included offense of A.R.S. § 13-2910(A)(8). (Doc. 127 at 18.)
The Flakes were not charged under the former statute. The Court accordingly need not
consider it.

1 they observed fell utterly short of that. It was for the police officers, not the
2 veterinarians, to know that. No reasonable person could have concluded from those
3 opinions or from anything else that Austin or Logan “knowingly or intentionally”
4 subjected the dogs “to cruel neglect or abandonment.” At most, it might suggest the
5 Flakes were negligent, which is not a felony in this state. For probable cause to have
6 existed, there must have been evidence that the Flakes either intended to subject the dogs
7 to cruel neglect or knew they were doing so. It is not enough that the Flakes intentionally
8 did acts the Hugheses had done for two years without any other incident as reflected on
9 the record here. They had to do it with intent or knowledge that it was cruelty. The
10 record contains no evidence they did.

11 **b. Malice**

12 “Malice” means an “improper motive.” *Nataros v. Superior Court of Maricopa*
13 *Cty.*, 113 Ariz. 498, 500, 557 P.2d 1055, 1057 n.1 (1976). The question is whether the
14 defendant sought out criminal proceedings “primarily for a purpose other than that of
15 securing the adjudication of the claim on which the proceedings are based.” *Visco v.*
16 *First Nat’l Bank of Ariz.*, 3 Ariz. App. 504, 507, 415 P.2d 902, 905 (Ct. App. 1966); *see*
17 *also* Restatement (Second) of Torts, § 653 (1977) (liability for malicious prosecution
18 exists where defendant “initiates or procures [criminal] proceedings without probable
19 cause and primarily for a purpose other than that of bringing an offender to justice”).

20 **i. Trombi**

21 As discussed above, a finder of fact could not reasonably conclude that Trombi
22 knew she was conveying false information to the grand jury and to prosecutors.
23 Moreover, the Flakes have sued Trombi for malicious prosecution only under federal law
24 (Doc. 101 at 9), which requires a showing that she sought charges specifically “for the
25 purpose of denying [the Flakes] equal protection or another specific constitutional right.”
26 *Awabdy*, 368 F.3d at 1066 (internal quotation marks omitted). There is no evidence that
27 she acted for the specific purpose of denying the Flakes a federal right.

28 Trombi is entitled to summary judgment against the claim of malicious

1 prosecution for the purpose of denying the Flakes federal rights under section 1983.

2 **ii. Arpaio**

3 The Flakes allege malicious prosecution against Arpaio under both state and
4 federal law. (Doc. 101 at 9.) The federal claim against him suffers the same defects as
5 the claim against Trombi: the Flakes have offered no evidence he sought to deprive them
6 of a specific constitutional right. The state law claim, however, does not have that
7 requirement. The Flakes must only show that Arpaio sought charges with malice (i.e., for
8 an improper purpose) and without probable cause. *See Slade*, 112 Ariz. at 300, 541 P.2d
9 at 552.

10 It is readily inferable that Arpaio reached out to prosecute the Flakes for the
11 primary improper purpose of garnering publicity. Arpaio issued repeated press releases
12 and held several press conferences drawing a striking level of public attention to the
13 incident. (Doc. 114 at 11.) The first press release on June 23, 2014, touted him as
14 “aggressive” on animal cruelty. (Doc. 113-6 at 87-88.) It enhanced the publicity that
15 Flake was the son of Senator Jeff Flake. A finder of fact could reasonably infer that
16 Arpaio sought charges against the Flakes primarily to gain publicity and bolster his own
17 public image rather than to bring them to justice for actual wrongdoing. That suffices
18 under state law for a triable issue of fact as to whether he pursued the prosecution for a
19 non-legitimate purpose. Of course, Arpaio could do that and get away with it as long as
20 he had the cover of probable cause. But without it, Arpaio’s actual motivation leaves him
21 open to liability.

22 Arpaio is therefore entitled to summary judgment on the federal malicious
23 prosecution claim, but not on the state claim.

24 **B. Defamation**

25 Defendants next seek summary judgment on the Flakes’ claims of defamation,
26 raised under federal and state law against both Arpaio and Maricopa County. The
27 defamation claims arise from statements in the June 23, 2014 press release and statements
28 Arpaio made in his September 9, 2014 press conference.

1 **1. Statute of Limitations**

2 Defendants first challenge the state-law defamation claims as barred by the one-
3 year statute of limitations for actions against public entities and employees. (Doc. 107 at
4 13.) *See* A.R.S. § 12-821. A defamation action accrues, and the statute of limitation
5 begins to run, upon publication of the defamatory statement. *Lim v. Superior Court in*
6 *and for Pima Cty.*, 126 Ariz. 481, 482, 616 P.2d 941, 942 (Ct. App. 1980). However, an
7 otherwise time-barred claim may proceed if it “relates back” to the original pleading.
8 *Boatman v. Samaritan Health Services, Inc.*, 168 Ariz. 207, 213, 812 P.2d 1025, 1031
9 (1990). Claims “relate back” if they arise “out of the conduct, transaction, or occurrence
10 set out—or attempted to be set out—in the original pleading.” Fed. R. Civ. P.
11 15(c)(1)(B).

12 The Flakes’ initial complaint, filed on June 19, 2015, alleged malicious
13 prosecution and abuse of process. They did not include defamation until their first
14 amended complaint, filed on January 15, 2016. (Doc. 40.) But their initial complaint
15 pointed to statements from the June 23, 2014 press release and the September 9, 2014
16 press conference that together form the core of the defamation claims here. *See* Doc. 1 at
17 5-7. The defamation claims therefore arise out of the same transactions or occurrences as
18 the original complaint and are not time-barred.

19 **2. Substantive Claim**

20 Defendants argue that the statements are not defamatory. To be liable for
21 defamation of a private person under Arizona law, a defendant must make a false
22 defamatory statement and either know, recklessly disregard, or negligently fail to
23 ascertain that it is false. *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 315, 560
24 P.2d 1216, 1222 (1977) (citing Restatement (Second) of Torts § 580B (1975)). The false
25 statement “must bring the defamed person into disrepute, contempt, or ridicule, or must
26 impeach [the person’s] honesty, integrity, virtue, or reputation.” *Godbehere v. Phoenix*
27 *Newspapers, Inc.*, 162 Ariz. 335, 341, 783 P.2d 781, 787 (1989).

28 To meet the First Amendment’s constitutional minimum, “a statement on matters

1 of public concern must be provable as false before there can be liability under state
2 defamation law.” *Turner v. Devlin*, 174 Ariz. 201, 206, 848 P.2d 286, 291 (1993) (citing
3 *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990)). The words used “must be
4 capable of being reasonably interpreted as stating actual facts about” the plaintiff.
5 *Turner*, 174 Ariz. at 207, 848 P.2d at 292. Statements of opinion may still be actionable
6 “when they ‘imply a false assertion of fact.’” *Id.* at 208, 848 P.2d at 293 (quoting
7 *Milkovich*, 497 U.S. at 18-19).

8 Additionally, to be actionable as a federal claim under section 1983, a plaintiff
9 must make a showing of “defamation-plus,” i.e., that the defendant’s defamatory
10 statement also caused an “injury to a recognizable property or liberty interest.” *Crowe v.*
11 *Cty. of San Diego*, 608 F.3d 406, 444 (9th Cir. 2010). The plaintiff can either “(1) allege
12 that the injury to reputation was inflicted in connection with a federally protected right; or
13 (2) allege that the injury to reputation caused the denial of a federally protected right.”
14 *Id.* (citing *Herb Hallman Chevrolet v. Nash-Holmes*, 169 F.3d 636, 645 (9th Cir. 1999)).

15 The Flakes point to two groups of statements they say were defamatory: (1)
16 statements made in the June 23, 2014 press release, and (2) statements Arpaio made
17 during the September 9, 2014 press conference. (Doc. 114 at 13-14; Doc. 101, ¶¶ 34,
18 61.) (In their response to Defendants’ motion for summary judgment, the Flakes point to
19 a third statement allegedly made in a separate July 9, 2014 press release. *See* Doc. 114 at
20 13-14. However, that press release is not mentioned in the complaint or anywhere else
21 until the Flake’s response brief to this motion. Accordingly, it will not be considered
22 here.) The statements will be analyzed under state and federal law in turn.

23 a. State Law

24 i. Press Release

25 The Flakes point to the following portion of the June 23, 2014 press release as
26 defamatory:

27
28 “Owners claim the air conditioning was cut off after a dog chewed
through some electrical wiring,” Arpaio says. “But *it seems unreasonable*

1 [that] dogs could be healthy at 11 PM at night and dead by 5:30 am the next
2 morning as the owners suggest. Even the veterinarian I met with today
3 agrees that the timeline given by the owners and caretakers is *highly*
4 *suspect*.[""]

5 [. . . .]

6 Jesse and Malesia Hughes who have operated the pet boarding
7 business for two years were out of the state when the dogs died. *The*
8 *animals were being overseen by [their] relatives, Logan and Austin Flake.*

9 (Doc. 114 at 13 (emphasis in plaintiffs' brief).)

10 The Flakes contend that Arpaio "falsely suggested that the Flakes were lying in
11 order to conceal their misconduct in reference to the deaths of the dogs." (*Id.*) However,
12 the Flakes also concede that the press release "does not identify Logan and Austin Flake
13 (or any other person) by name as wrongdoers." (Doc. 108, ¶ 26; Doc. 113, ¶ 26.) For
14 that reason alone the statement is not defamatory.

15 In any event, the statements are not actionable as defamation. Arpaio first said
16 that "it seems unreasonable" the dogs could have declined so rapidly overnight "as the
17 owners suggest." That may be equivalent to saying, "Their story does not make sense,"
18 or, "I don't believe their story." But both of those are opinions, not assertions of fact
19 "provable as false." *Turner*, 174 Ariz. at 206, 848 P.2d at 291. The same is true of
20 Arpaio's subsequent statement that a veterinarian agreed with him that the Flakes'
21 purported timeline was "highly suspect." The Flakes have not alleged that the
22 veterinarian did not in fact speak with Arpaio and agree with him. Nothing else about
23 that statement is provable as false.

24 Statements of opinion can still be defamatory if they imply provably false
25 assertions of fact. *Turner*, 174 Ariz. at 208, 848 P.2d at 293. The quoted statements do
26 not. Moreover, as a constitutional minimum, "where a statement of 'opinion' . . .
27 reasonably implies false and defamatory facts regarding . . . a private figure on a matter
28 of public concern, a plaintiff must show that the false connotations were made with some

1 level of fault . . .” *Milkovich*, 497 U.S. at 20; *see also Gertz v. Robert Welch, Inc.*, 418
2 U.S. 323, 347 (1974) (holding that states may set standards for defamation liability “so
3 long as they do not impose liability without fault”). The Flakes have not shown any level
4 of fault on the record here.

5 *Turner* illustrates how the statements Arpaio made skirt the boundaries of
6 defamation. There a school nurse made a number of public statements about a police
7 officer’s interview with a student. *Turner*, 174 Ariz. at 209, 848 P.2d at 294. The nurse
8 said that the officer “demanded that the student stand against the wall,” that the student
9 was “interrogated,” that the officer acted in a “rude and disrespectful fashion,” that his
10 “manner bordered on police brutality,” and that he engaged in “outdated, uneducated
11 behavior.” *Id.* at 209-10, 848 P.2d at 294-95. The court rejected the officer’s contention
12 that these statements were false accusations of misconduct. To ascertain whether the
13 officer “demanded or requested the child to stand, whether his inquiry was more like a
14 criminal interrogation rather than questioning, whether his manner was rude,
15 disrespectful, outdated, and uneducated as opposed to something less offensive all lie
16 beyond the realm of factual ascertainment or proof.” *Id.* at 207, 848 P.2d at 292. There,
17 words such as “manner,” “as if,” and “bordered” showed “that the characterizations were
18 not meant to be precise.” *Id.* at 208, 848 P.2d at 293. Here, too, Arpaio used tentative
19 language. He said that the story “seems unreasonable” and that he and a veterinarian
20 agree it is “highly suspect.” His statements in the press release do not amount to
21 actionable defamation.

22 **ii. Press Conference**

23 Next, the Flakes point to Arpaio’s statements at the September 9, 2014 press
24 conference as defamatory. They argue:

25
26 Arpaio falsely claimed he had “proper evidence” that Austin and Logan
27 deprived 25 dogs of “food, water and shelter” and thereby caused their
28 deaths. He also falsely claimed that their explanation for the deaths did not
pass the “smell test,” which indicates that they are liars. Finally, Arpaio
also falsely accused Austin and Logan of engaging in a criminal

1 conspiracy.

2
3 (Doc. 114 at 14-15.)

4 For starters, there is no evidence that Arpaio accused them of taking part in a
5 conspiracy. Additionally, Arpaio's statement that their explanation did not pass the
6 "smell test" is not actionable because it is not a factual statement "provable as false."
7 *Turner*, 174 Ariz. at 206, 848 P.2d at 291. Finally, a more complete version of the first
8 statement they point to reads as follows:

9
10 So we finally completed the investigation. We turned it over to the
11 County Attorney for review and don't forget that they had to make sure
12 they had the proper information and evidence to prosecute. So we're
13 recommending to the County Attorney that 21 felony charges be pursued
14 against the four suspects in this investigation. The four targets that we
started out with and I am sure that that office will review the evidence and
we'll see what happens.

15 I'm very confident that we have the proper evidence. And, once
16 again, the County Attorney's Office will review our evidence. We're
17 recommending 21 felony charges, several misdemeanor charges. . . .

18 (Doc. 61-1 at 5.)

19 Arpaio's statement "I'm very confident that we have the proper evidence" refers
20 back to his statement about "the proper information and evidence to prosecute." That
21 does not assert that the Flakes were guilty. In the first place, it is a statement of
22 confidence and opinion, not purported fact. The surrounding statements reiterated
23 (earnestly or not) that the County Attorney's Office would have to review the evidence
24 before deciding whether or not to charge anyone. That is not to say one can always avoid
25 liability by prefacing a statement of guilt with "I'm very confident." *Cf. Cianci v. New*
26 *York Times Pub. Co.*, 639 F.2d 54, 64 (2d Cir. 1980) (Friendly, J.) ("It would be
27 destructive of the law of libel if a writer could escape liability for accusations of crime
28 simply by using, explicitly or implicitly, the words 'I think.'"). But this was only a

1 statement “that we have the proper evidence,” not that the Flakes are guilty.

2 Second, and related, it is unclear the “proper evidence” meant proper evidence to
3 prosecute. It could have meant evidence sufficient to indict, which would be evidence of
4 probable cause, and not evidence sufficient to convict, which would be evidence beyond
5 a reasonable doubt. It turned out there was not even evidence sufficient to indict, but
6 Arpaio qualified what he said as a statement of confidence, not of fact. His ambiguous
7 statement of confidence is not provably false and is therefore not actionable defamation.

8 **b. Federal Law**

9 Because “defamation-plus” under section 1983 requires a showing of a
10 constitutional violation on top of all defamation’s state law elements, the statements the
11 Flakes have identified all fall short.

12 The Flakes point to *Gobel v. Maricopa Cty.*, 867 F.2d 1201 (9th Cir. 1989),
13 *abrogated by Merritt v. Cty. of Los Angeles*, 875 F.2d 765, 769 (9th Cir. 1989), for the
14 proposition that “a prosecutor’s false accusations of criminal misconduct ‘made in
15 connection with [an] illegal arrest’ constitute ‘the kind of defamation plus [sic] injury
16 necessary to state a cognizable section 1983 claim.’” (Doc. 114 at 15 (quoting *Gobel*,
17 867 F. 2d at 1205).) The Flakes were not arrested. (Doc. 108, ¶ 19; Doc. 113, ¶ 19.)
18 They point to no specific constitutional injury they suffered from Arpaio’s statement.
19 Arpaio and Maricopa County are entitled to summary judgment on all defamation claims,
20 federal and state.

21 **C. False Light Invasion of Privacy and First Amendment Retaliation**

22 Defendants next seek summary judgment on the Flakes’ false light invasion of
23 privacy claim as time-barred. Though the Flakes raised it in their complaint, they did not
24 defend the claim in their briefing on this motion. A party forfeits a claim it failed to raise
25 in response to a summary judgment motion. *See Jenkins v. Cty. of Riverside*, 398 F.3d
26 1093, 1095 n.4 (9th Cir. 2005) (deeming claims “abandoned” that were not raised in
27 opposition to summary judgment motion); *Doe v. Dickenson*, 615 F. Supp. 2d 1002, 1010
28 (D. Ariz. 2009) (plaintiff’s failure to respond to defendant’s arguments rendered

1 applicable claims waived). The Flakes have abandoned their false light claim. Summary
2 judgment will be granted for Defendants as to those claims. The Flakes have also
3 abandoned their First Amendment retaliation claim because they did not respond to
4 Defendants' Motion for Summary Judgment on that issue, either.

5 **D. Qualified Immunity**

6 Defendants also seek summary judgment based on qualified immunity.

7 Under federal law, public officials are entitled to qualified immunity "insofar as
8 their conduct does not violate clearly established statutory or constitutional rights of
9 which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231
10 (2009) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A right is "clearly
11 established" where "it would be clear to a reasonable officer that his conduct was
12 unlawful in the situation he confronted." *Lacey v. Maricopa Cty.*, 693 F.3d 896, 915 (9th
13 Cir. 2012) (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). The right violated must
14 have been "clearly established in light of the specific context of the case" at hand.
15 *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (en banc). There need not be "a
16 case directly on point," but "existing precedent must have placed the statutory or
17 constitutional question beyond debate." *Id.* at 442. The federal claims here fail for lack
18 of violation of a federal right in the first place. It is not necessary to inquire into qualified
19 immunity.

20 Police officers have a similar qualified immunity from individual liability under
21 Arizona law. *Portonova v. Wilkinson*, 128 Ariz. 501, 503, 627 P.2d 232, 234 (1981).
22 This holds except where the officer "knew or should have known that he was acting in
23 violation of established law or acted in reckless disregard of whether his activities would
24 deprive another person of their rights." *Chamberlain v. Mathis*, 151 Ariz. 551, 558, 729
25 P.2d 905, 912 (1986).

26 The only surviving state law claims are for malicious prosecution against Arpaio.
27 The analysis is similar to the federal law qualified immunity analysis, except that the
28 Court must also inquire into Arpaio's state of mind. The question is whether Arpaio

1 “knew or should have known that he was acting in violation of established law or acted in
2 reckless disregard of whether his activities would deprive another person of their rights.”
3 *Chamberlain*, 151 Ariz. at 558, 729 P.2d at 912. The salient facts here are disputed. A
4 reasonable factfinder could conclude that Arpaio pursued charges against the Flakes for
5 the primary purpose of garnering publicity. Arpaio and any law enforcement officer had
6 to have known that is not a proper purpose of criminal prosecution. That is enough to
7 render summary judgment inappropriate.

8 **IV. SUMMARY**

9 Defendants’ motion for summary judgment is denied as to the state law malicious
10 prosecution claims against Arpaio and Maricopa County. As a matter of law, prosecutors
11 did not have probable cause to charge the Flakes with animal cruelty, and summary
12 judgment is granted for the Flakes on this point. It is for a trier of fact to decide whether
13 Arpaio exhibited malice in seeking charges against the Flakes; if so, whether the
14 independent judgment presumption insulates him from liability; and whether he is
15 protected from suit by qualified immunity under Arizona law. For the remainder of the
16 claims and issues, summary judgment is granted in favor of Defendants and against the
17 Flakes.

18
19 IT IS THEREFORE ORDERED that Defendant’s Motion for Summary Judgment
20 (Doc. 107) is granted in part and denied in part as summarized in the preceding
21 paragraph.

22 IT IS FURTHER ORDERED that the Flakes’ motion for partial summary
23 judgment (Doc. 114) is granted that there was no probable cause for the charges but is
24 otherwise denied.

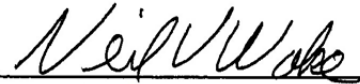
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1 IT IS FURTHER ORDERED that summary judgment is granted in favor of
2 Defendant Marie Trombi and against Plaintiffs.

3 Dated this 31st day of August, 2017.

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6 _____
7 Neil V. Wake
8 Senior United States District Judge
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